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ABSTRACT

Presented is an outline of the implications of federal and state legislation regarding handicapped children's right to education. Twelve characteristics (such as calling for early childhood education for the handicapped) are listed; and some implications for the public school system are given which include a developing conflict between the right of the mentally handicapped child to an appropriate placement and the duty of the schools to undo and prevent dual school systems based on race, a continuing debate over the financing of special education, and the public schools having to seek help from private sector groups to educate all handicapped children. (SB)

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SPECIAL EDUCATION AND LAW: IMPLICATIONS FOR THE SCHOOL

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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I. Introduction

A. Since 1972 many cases have been directed at establishing the right to education. The problem now is not so much establishing the right to education as it is implementing it and assuring its quality.

B. But those cases are significant and should be reviewed:

1. All children can learn; we can teach them; therefore, we must teach them.

2. When the state undertakes to educate all children, it cannot exclude the handicapped.

3 Handicapped children are entitled to an "appropriate" education, one suited to their needs and conditions.

4. Handicapped children should be placed in the least restrictive alternative appropriate program. That is, they should be mainstreamed into the next most normal program if that placement is available (i.e., it is an alternative) and if that placement is appropriate (beneficial to the child and suited to his needs and conditions).

5. No child may be excluded from a placement or program without first having a procedural due process opportunity to protest.

6. There must be a continuing census of the handicapped population so schools can plan programs for them, appropriate funds for them, and include them in school.

C. Federal and state legislation also establish the right to education. The characteristics of those laws are:

1. They require mandatory (zero reject) education, including:
   a. all children must be included in a school program
   b. an annual census of exceptional children
   c. appropriate educational opportunities
   d. procedural due process opportunities

2. They call for compensatory education for those previously excluded.

3. They call for early childhood education for the handicapped.

4. They provide tuition subsidies.

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5. They effect inter-agency cooperation and interlocal cooperation (no service gaps).

6. They repeal inconsistent prior law.

7. They generally adopt a noncategorical approach; some legislation, however, continues the categorical approach for purposes of program authorization and for purposes of allotting state or federal money to local schools (e.g., PL 94-142).

8. They state a preference for mainstreaming.

9. They require an individual education plan (Gallagher/Weintraub contract idea). For example, PL 94-142 requires this and is consistent with principles of appropriate education and procedural due process.

10. They provide for the confidentiality of records and student right of access in the interests of preserving privacy and assuring accountability (PL 94-142; FERPA).

11. They encourage parent involvement (PL 94-142).

12. They set new priorities for money for the unserved, malserved, and finally, the presently appropriately served (PL 94-142).

II. Some of the implications. The general implication is the establishment of rights for children against and within the system of public education

A. The right-to-education movement is an extension of former civil rights battlefields.

1. It relies on Brown v. Bd. for an assessment of the value of education and an implication of the equal protection concept that separate education is inherently unequal.

2. It has its preludes, including the right-to-treatment cases, those involving racial minorities, sex discrimination, punishment for non-violent crimes, civil commitment procedures, criminal procedures, voting rights (one man/one vote; access to franchise/poll tax and Voting Rights Act of 1965), and civil rights legislation and litigation generally.

B. The right-to-education movement is an attack on a system that believed that if you are retarded, you are incompetent; if you are incompetent, you cannot learn; if you cannot learn, there is no reason to have you in school.

C. It is an attack on the system of distributing governmental benefits and burdens, where the benefits have gone to the most meritorious and the burdens to the least meritorious, and where merit correlates with intelligence.

D. It is a reflection of the principle of egalitarianism: among MR/MH, the idea of normalization; and among lawyers, the concept of equal protection.

E. It represents a shift from the "charity" to the "rights" posture: we don't want your charity, we want our rights.

F. Procedural due process causes education to be child-centered: the child is the focus of attention, and the system must adapt to his right to an appropriate education.

G. There is a developing conflict between the right of the mentally handicapped child to an appropriate placement and the duty of the schools to undo and prevent dual school systems based on race. The source of this problem seems to be in the school districts where a substantial portion of educable mentally retarded pupils are members of a racial minority. In those districts, the special education classes for the educable mentally retarded children seem to have been occupied to a large extent by racial minority pupils, apparently in violation of desegregation guidelines that require a racial balance in school programs and districts. The conflict is easily stated: if the right to an appropriate education means that there will be racially disproportionate groupings in some special education programs (principally those for the mildly handicapped students, for whom the phenomenon of familial and cultural retardation is particularly relevant), and if the requirement for racial desegregation means that disproportionate numbers of racial minorities may not be placed in the same program (special education for the mildly handicapped), then there is an inevitable collision course. One solution may be to use classification standards that are racially and socio-economically validated and that do not have the likelihood of discriminating against racial minorities on account of their race. Another may be to abolish programs for the educable mentally retarded, thus advancing the principle of mainstreaming and simultaneously obviating the racial imbalance problem that occurs in those programs. This latter solution may be beneficial for the mildly handicapped child since it would result in a mainstream placement, which is preferred by the courts and legislatures and by many educators. On the other hand, it may not be helpful to the more handicapped child who falls into the fairly wide range of students classified as educable mentally retarded or as high-trainable mentally retarded. For those students, a separate program may be the most educationally appropriate even though it is racially imbalanced. This conflict seems to have been resolved for the present in favor of the policy against dual educational programs.

H. There undoubtedly will be a continuing debate over the financing of special education. As the schools begin to implement the zero-project and appropriate education principles, the costs of special education will be driven higher than they are now and the special education demands on an already limited public fisc will spiral in geometric proportions.

The requirements that will be made on local school systems as a result of educating exceptional students carry accompanying demands on the local level of school financing and thus have implications for the pattern of school financing. If the fiscal demands outstrip the ability of local school systems to respond, a shift in the pattern of financing from primarily local to primarily state financing may occur. It need not, however, necessitate a similar centralizing shift in planning and program development, which may nevertheless retain local characteristics under a state-level financing scheme. Local planning and program responsibility will, however, begin to yield to state-level planning and programming if local schools are neither able nor willing to comply with the new requirements of zero reject and appropriate education. That would be unfortunate if it also heralds the abandonment of small school units, where compliance may be more feasible than in larger ones. Fiscal centralization does not have to entail administrative centralization.

A decision will have to be made whether the state will assume all special education costs or only part of them. Related questions are: What cost-sharing arrangements will be necessary or desirable among state and local units? What tax base is to be relied on for financing the new costs? To what extent can private-sector services be purchased by the state or local units? In addition, decision-makers must take into account the costs of producing an adequate number of new professionals for the schools and universities. And finally, because of the absolute limitation on available funds, budgets for "normal" programs may have to be adjusted in order to provide for "special" programs.

Another fiscal dislocation may be in the offing. Equal protection in the provision of educational services is a cornerstone principle in opening up the school system to the handicapped child; it also is a principle that advances the interests of mainstreaming. Yet it is a two-edged sword. It asserts equality in access to education, but it might be construed to mean that special consideration to special education is impermissible, with the possibly untoward consequences that programs for the exceptional student, which presumably cost more to operate per capita than programs for the non-handicapped student, may be limited to per capita expenditures equal to those for "regular" educational programs. This result would be unfortunate in the cases of the more generously financed programs for the special student but a boon for the less-than-equally financed programs. Principles of equality also may impinge upon or enhance the special education of one category of special student where the equality must exist with respect to that special child and the "normal" child. Finally, those principles may have similar consequences if equality means that equal expenditures per capita or per type of special student are to be required among the various categories of special children, e.g., expenditures on the emotionally disturbed must equal expenditures on the mentally retarded.

Implicit in these considerations is the issue whether funds that ordinarily would be spent for education of the exceptional child may be diverted from their original purpose in order to be spent on the costs of mainstreaming, i.e., on not only enabling the exceptional child to cope with the mainstream but helping the mainstream to cope with him.

Also implicit is the issue that categorical programs for different types of special students may be necessary since they assure that funds and programs will reach the types of special students who need special help, but undesirable because of their tendency to resist mainstreaming efforts.

The objections to investing public funds in special education, the political and educational constraints on that course of action, the reasons to invest money at early ages and throughout the secondary level are items to be addressed in the general area of financing public special education. Related items are the investments made in it by the private sector and how they can be used to increase the public commitment, as, for example, through cost-saving accomplished by sharing of functions or by tax-credit or other income-tax related devices designed to spur a private response or alleviate the intolerable burden imposed on parents for whom no public response is otherwise forthcoming. Finally, of course, the issues of who pays, who gets, what do they pay, how much do they pay, what portion of the total education budget is allocated to special education, how much more needs to be allocated if zero-reject and appropriate education policies are to be taken seriously, what is the level of the government doing the taxing and spending the money (e.g., local or state)--these and related issues of the nature, pattern, level and type of financing of special education will be the subject of thorough study and probably change.

K. Another implication for the schools has to do with the locus of decision-making. The schools, and especially special education, are being asked to share their power to make decisions with others--courts, legislatures, parents, consumer advocates, etc. Since the number of subjects on which decisions must be made is finite, it follows that, as more and more people become involved in making decisions, each person will have relatively less ability to make a decision by himself. The sharing of power is a matter that public school officials will reluctantly accept because traditionally they are accustomed to not having to share it. Moreover, since the territory of the participants--courts, legislatures, state agencies, parents, pupils, and educators--is not well defined and may be in flux for years to come, it will not be easy to determine who has prevailing rights in a variety of circumstances. In short, the "power" or "territory" of each participant is not now defined and thus the presently unsettled nature of decision-making in right-to-education matters will continue and possibly become exaccerbated. However, since the procedural due process requirements attempt to and have the potential of making the decision-making process fair, it may be that, wherever the locus of power to make decisions finally is, we all--courts, legislatives, parents, consumer advocates, etc.--will be willing to abide by the result. Lawyers believe--and I hope educators will come to believe--that a fair process for making decisions generally will result in acceptable decisions.

L. The infrastructure of the school will change. Special education itself, which traditionally has been administratively and financially separate from education for the non-handicapped, will become the subject of a "mainstreaming" effort. The attempt to integrate special education with the system for the education of non-handicapped will have profound effects on the administration, organization and financing of the public schools themselves.

M. Of course, manpower implications exist. Not only must more special educators be produced, but educators of non-handicapped students must become more qualified to handle the handicapped child. Special educators themselves will tend to focus more on the severely or profoundly handicapped child and less on the mildly or moderately handicapped child. In short, special educators will undergo a re-definition of their roles; so too will the educators of the non-handicapped. The implications of this trend for higher education is the subject of a separate discussion.

N. The public schools are not able, and should not be expected, to have overnight capacity to educate all handicapped children. For this reason, they will have to seek help from private-sector groups such as developmental day care centers and other private schools for the handicapped.

Moreover, light of the zero-reject policy, the public schools will begin to function as either the parallel agency for the education of the institutionalized handicapped pupil or the primary agency for educating that pupil. Many handicapped school-age children are not in the community; they live in institutions. Yet their claim to an education is no less powerful, in law, than that of community-based children. They are entitled to an education, whether through the public schools or by a state agency having primary responsibility for them (e.g., a state mental retardation agency or a state department of human resources). In either event, the public schools will be affected.

O. Finally, there are significant implications for special educators as professionals. These deal with their responsibilities, rights, and liabilities as professionals in their relationship in handicapped children. I would like to defer discussing these matters, since they already have been discussed in Weintraub and McCaffrey's article in Part V, Public Policy and the Education of Exceptional Children (CEC, 1976). Moreover, they will be the topic of further work by CEC.